IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA, AND
CITY OF PLAQUEMINE, LOUISIANA, *Petitioners*,
v.
LOUISIANA POWER & LIGHT COMPANY, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND BRIEF AMICUS CURIAE OF

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY UTILITIES COMPANY, NEW ENGLAND POWER COMPANY, PACIFIC GAS AND ELECTRIC COMPANY, PUBLIC SERVICE COMPANY OF INDIANA, INC., AND SOUTHERN CALIFORNIA EDISON COMPANY SUPPORTING RESPONDENT LOUISIANA POWER AND LIGHT COMPANY

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-864

City of Lafayette, Louisiana, and
City of Plaquemine, Louisiana, *Petitioners,*

v.

Louisiana Power & Light Company, *Respondent.*

MOTION OF COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY, INDIANA & MICHIGAN ELECTRIC COMPANY, KENTUCKY UTILITIES COMPANY, NEW ENGLAND POWER COMPANY, PACIFIC GAS AND ELECTRIC COMPANY, PUBLIC SERVICE COMPANY OF INDIANA, INC., AND SOUTHERN CALIFORNIA EDISON COMPANY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE SUPPORTING RESPONDENT LOUISIANA POWER AND LIGHT COMPANY

Columbus and Southern Ohio Electric Company, Indiana & Michigan Electric Company, Kentucky Utilities Company, New England Power Company, Pacific Gas and Electric Company, Public Service Company of Indiana, Inc., and Southern California Edison Company ("the Companies") ask this Court for leave

to file the attached brief *amicus curiae* supporting the position of respondent Louisiana Power and Light Company. Counsel for respondent and for petitioners have not consented to the filing of this brief.

The Companies, either directly or through their subsidiaries or affiliates, own and operate systems for generation, transmission and distribution of electric power, subject to regulation by the states in which they operate and by the Federal Power Commission. Electric utilities have been held to be subject to the federal antitrust laws. See *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973). Federal antitrust policies are considered under section 105(c) of the Atomic Energy Act of 1954, as amended,[1] and under the Federal Power Act.[2]

The issue here is whether, in operating their municipal electric utility businesses, the petitioning municipalities are automatically beyond the reach of the federal antitrust laws. The resolution of this issue will have an effect far beyond its impact on two Louisiana municipalities. In the United States some 1750 municipalities are engaged in the electric utility business, including such major cities as Los Angeles, California; Seattle, Washington; Memphis, Tennessee; Jacksonville, Florida; and San Antonio, Texas. If municipally owned electric systems are unrestrained by the federal antitrust laws from engaging in anticompetitive activities, such as those described in the counterclaim in this proceding, the Companies, other investor-owned utilities, and the public will be adversely affected. The Companies therefore believe that it is important for the Court to hear their views.

[1] 42 U.S.C. § 2135.

[2] *E.g., Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747 (1973).

Respectfully submitted,

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QUESTION PRESENTED

Can a municipality engaging in anticompetitive practices in connection with its electric utility business escape the reach of the federal antitrust laws simply because of its status as a municipality?

ARGUMENT

I. A Municipality Engaging in Anticompetitive Practices in Connection With Its Electric Utility Business Cannot Escape the Reach of the Federal Antitrust Laws Simply Because of Its Status as a Municipality.

The petitioning Cities' position is, starkly, that insofar as the federal antitrust laws are concerned, if a municipality does it, it is legal. They rely, of course, on the holding of *Parker* v. *Brown*[1] that the Sherman Act did not undertake to restrain the state acting as sovereign. By substituting "municipality" for the "state acting as sovereign" the Cities easily reach their desired result. The substitution, however, is not so easily made.

The state, like other incorporeal entities, must act through agents and may indeed act through incorporeal agents, such as municipalities, which in turn act through their agents. To make *Parker* effective, therefore, requires that the agents which carry out the state's directions be insulated from the federal antitrust laws. It does not follow, however, that *all* official acts of *all* state agents or agencies are insulated from federal antitrust scrutiny.

A unanimous Court in *Goldfarb*[2] clearly held that *some* acts of state agencies are subject to federal antitrust laws. Relying on *Parker,* the Court carefully distinguished between those state actions which are

[1] 317 U.S. 341 (1943).

[2] *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), where the Court considered whether the establishment of a minimum fee schedule by the Fairfax County Bar Association and its enforcement by a state agency, the Virginia State Bar, violated the federal antitrust laws.

and those which are not subject to the federal antitrust laws, finding exempt only those state actions required by the "state acting as sovereign";

> The *threshold* inquiry in determining if an anticompetitive activity is *state action of the type* the Sherman Act was meant to proscribe is whether the activity is *required by the State acting as sovereign. Parker* v. *Brown* . . . . It is not enough that . . . anticompetitive conduct is prompted by state action; rather, anticompetitive activities must be *compelled by direction of the State acting as sovereign.* 421 U.S. at 791-792 (emphasis added).

The important point is that both *Parker* and *Goldfarb* frame this issue in terms of the nature of the activity and the extent of its authorization by the state as sovereign, not in terms of bare status as argued by Cities. Cities' position is that no ~~all~~ activities of certain state agencies, i.e., municipalities, are subject to the federal antitrust laws. Thus, in their view, municipalities escape from any need for the *Goldfarb* analysis as to whether the state as sovereign required their questioned activities.

Cities would distinguish *Goldfarb* because the Virginia State Bar was a "state agency for some limited purposes" (421 U.S. at 792), whereas municipalities, they say, are "wholly governmental" (Br. 5). But this is a distinction without a difference. Though municipalities are governmental bodies, they have only those powers delegated to them under the laws of their state. They make municipal policy, within appropriate limitations, but clearly, in so doing they are not making state policy of the type contemplated in *Parker.* Their argument that they are exempt from

federal antitrust laws, without regard to state policy and without inquiry into whether they are carrying out a direction of the state as sovereign, cannot be squared with the *Parker* and *Goldfarb* approaches.

Cities also would distinguish *Goldfarb* because it involved voluntary action in the pecuniary interests of the State Bar members. In their electric business, however, Cities are engaged in a proprietary function. As the district court below found: "the Cities are engaging in what is clearly a business activity: activity in which they earn a profit". (App. 49). Moreover, the anticompetitive activities Cities allegedly engaged in are "voluntary" in the same sense as the activities of the State Bar: that is, they represented deliberate choices among courses of conduct, choices which were not required by the state. But Cities would foreclose any examination of this parallel to *Goldfarb* simply by invoking their status as municipalities.

The Cities attempted distinction of *Goldfarb* comes down to their assertion that "the State Bar's activity was not state action". (Br. 11). But what the Court actually decided was that the State Bar's activity was not the *type* of state action covered by *Parker*. It could hardly have done otherwise. Obviously, *Parker* does not exempt all state action. Its references to "legislative command of the state", "activities directed by its legislature", and its conclusion that

> *The state in adopting and enforcing the prorate program* made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.* (317 U.S. at 350-352, emphasis added).

are clear and positive indications that only certain types of state actions are exempt.

This Court's subsequent opinions in *Cantor* v. *Detroit Edison Co.*[3] do not help Cities' case. There, Detroit Edison's tying of light bulb sales to electric utility service was held to be action by the Company and not action of the state agency itself. The fundamental question was how far *beyond* state agency activities the *Parker* principle should apply. The plurality opinion noted that the *Parker* decision was "narrow" and described it as applicable to "action taken by state officials *pursuant to express legislative command*" (428 U.S. at 589, emphasis supplied), clearly implying that action of state officials not so taken is not within the *Parker* holdings. Furthermore, in considering whether the fact that Detroit Edison was operating under a general state regulatory scheme brought the Company within the *Parker* rule, five members of the Court agreed that it did not, absent an explicit state direction to its regulatory agency.

In short, the *Cantor* analysis parallels that of *Parker* and *Goldfarb,* confirming that the availability of the state action antitrust exemption depends on the nature of the action and its place in state policy, rather than on the mere identity of the actor.[4]

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[3] 428 U.S. 579 (1976).

[4] Since *Goldfarb,* three Circuit Courts of Appeal have unanimously rejected the simplistic state action test Cities press here: the Fifth Circuit in the case below, the Third Circuit in *Duke & Co.* v. *Foerster,* 521 F.2d 1277 (1975) and the Seventh Circuit

II. The *Parker* Exemption Should Be Strictly Construed in Its Application to Anticompetitive Practices of a Municipality in Its Proprietary Conduct of an Electric Utility Business.

A majority in *Cantor* endorsed a severe test for determining whether regulatory policy is a basis for exemption from federal antitrust laws under *Parker:*

> The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. Therefore, assuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.
>
> The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, "and even then only to the minimum extent necessary". 428 U.S. at 596-597 (footnotes deleted).

This strict test limits exemptions from the federal antitrust laws even though regulatory controls would still apply to the action exempted. A similar test should be applied even more strictly where, as here, the state does not purport to regulate at all but merely authorizes the participation of subordinate state agencies in commercial enterprises. There should be no implied exemption without first determining that it is necessary to implement some policy of the state acting as sovereign.

Particularly, when the state authorizes a municipality to engage in a business enterprise it does not thereby establish that it is state policy that the municipality have a blanket exemption from federal antitrust law. True, a municipal electric utility may have monopolistic aspects, as does every electric utility operation, regardless of ownership, but this need not and does not carry with it exemption from all the requirements of antitrust law.

The purpose of *Parker* is served by looking to the policy which the state establishes for its subordinate agencies and excluding federal antitrust law interference with those policies. Nothing more is necessary to give the states the freedom which *Parker* found Congress intended.

As *Parker, Goldfarb* and *Cantor* make clear, state policy is to be determined by looking to its sovereign action, essentially the pronouncements of its legislature. Mere neutrality on the part of state law did not suffice to exempt the light bulb tie-in in *Cantor;* no more should it suffice here to exempt the Cities' anticompetitive conduct.

Cities try to avoid the fact that they are engaged in a business activity by decrying the governmental-proprietary distinction, citing pre-*Goldfarb* cases in the courts of appeal and this Court in *Indian Towing Company* v. *United States,* 350 U.S. 61 (1955). In the

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in *Kurek* v. *Pleasure Driveway and Park District of Peoria,* No. 76-1791, May 26, 1977 where the court said:

> *Cantor* and *Goldfarb* demonstrate beyond serious questioning that the Supreme Court is not inclined any longer, if it ever was, to accept superficial and mechanical application of a *Parker*-based "rule" that antitrust inquiry ends upon such a finding of governmental actions or laws being involved. Slip. Op. at 11.

latter case the Court declined to find an immunity from damages (resulting from failure of a lighthouse beacon) by applying the distinction. More recently, in *Dunhill* v. *Cuba,* 48 L.Ed. 2d 301 (1976) four members of this Court relied upon the distinction between governmental acts of a foreign state and its private and commercial acts, quoting the following from Chief Justice Marshall in *Bank of United States* v. *Planters' Bank of Georgia,* 9 Wheat 904, at 907, 6 L.Ed. 244 (1924):

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

The distinction between governmental and proprietary activities of a governmental body arose as a limitation on the sovereign immunity of governments from suit. In general, the erosion of the distinction has been in the direction of reducing governmental immunity so that it is really the immunity, and not the distinction, which has been discredited. Cities push in the other direction, hoping to give their business activity a blanket exemption because it is owned by a governmental agency. Where the proprietary nature of the enterprise is clear cut, however, as in the operation of an electric utility business, it represents a factual distinction which certainly should be taken into account by the Court in applying *Parker*. In particular, a proprietary activity should be subjected to stricter tests, pursuant to *Cantor* principles, than a governmental activity.

III. It Is in the Public Interest to Restrain Anticompetitive Practices of a Municipality Which Have Not Been Directed by Sovereign State Action.

In an endeavor to maintain their position of complete exemption from federal antitrust law Cities argue that public policy reasons require such a result. They say that because they "function solely in the public interest", an "analysis of any legislative mandate to engage in particular anticompetitive acts is *unnecessary*" (Br. 18, emphasis added). This argues that anticompetitive activities are in the public interest whenever undertaken by a city.

An assumption that the motives of the municipalities are public spirited does not serve to bring them within *Parker* for at least two reasons. First, the rationale for the *Parker* interpretation of the Sherman Act was that federal antitrust restraints were not intended to be placed on explicit state policies. The reason for confining the exemption to explicit state policies is clear. Because even the most public spirited officials in political office frequently differ as to what is in the public interest, it is entirely reasonable to exempt the implementation of only those policies which have been explicitly adopted by the state and not of every policy deemed by a state or municipal official, however high-minded, to be in the public interest.

Secondly, the public interest of a municipality is not necessarily equivalent to the public interest of

the state as a whole. Conflicts between state and municipal officials as to public policy are aired in the press and news media almost daily, often representing the differences between local interests and those with a regional or state wide aspect.[5] Yet *Parker* was concerned only with protecting state freedom to act as contrasted with the diverse actions which might be taken by undirected local state agencies.

Cities, of course, point to no state policy from above which contemplates the anticompetitive activities complained of and, in fact, there could be a statewide policy to the contrary. Their position is that inquiry into such matters is irrelevant and that whatever a municipality does is in the "public interest" and therefore state policy for *Parker* purposes. This would extend exemption from national antitrust policy far beyond anything contemplated in *Parker* and take an approach contrary to *Goldfarb* and *Cantor*.

Cities recite problems and "disruptions" which would result if they are potentially liable under the federal antitrust laws. These are the same problems

[5] Drawing on an argument in the pre-*Goldfarb* opinion of the Ninth Circuit in *State of New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (1974), Cities argue that since their officials are subject to removal by popular vote, should their performance "not conform to the will and expectation of the electorate" the antitrust laws are "neither necessary nor appropriate to prevent transgressions by local public authorities" (Br. 23). The Ninth Circuit, however, in discussing the subject as it related to state government, said: "where a state's activities affect the economy of another state, to whose citizens it is not responsible politically, the activity must be carried out within the confines of the Interstate Commerce Clause" (501 F.2d at 367, n. 8, last paragraph). In other words, electoral control cannot be counted upon to protect the public interest outside of the electoral boundaries. By the same token, municipal electoral views should not be taken as representative of state policy.

which non-municipal electric utilities must accept and face, as *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973); and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976) indicate. Cities, in "engaging in what is clearly a business activity: activity in which a profit is realized", as the district court below found, should be equally capable of coping with the universal problems of complying with the law. This Court found in *Cantor* that the uncertainties of the Sherman Act and the exposure to treble damage liabilities did not call for exemption, even when the electric utility's tariff covering the bulb exchange program had been approved by the state regulatory commission. Cities have shown no justification for more lenient treatment of liability for anticompetitive conduct of a municipal electric utility, if proven.

Cities express concern that potential antitrust liability would have a "chilling effect" on their decision making. But such deterrence from predatory anticompetitive practices is precisely the purpose of the antitrust laws.

In the same vein, Cities argue that their simplistic interpretation is easier for the courts to apply. This has already been answered in *Cantor* where a simple rule of relying upon state regulatory approval was urged upon the Court. Mr. Justice Stevens responded that under such a rule:

> No matter what the impact of the proposal on interstate commerce, and no matter how peripheral or casual the State's interests may be in permitting it to go into effect, the state act would confer immunity from treble damage liability. Such a rule is supported by the wholesome interest in

> simplicity in the regulation of a complex economy. In our judgment, however, that interest is heavily outweighed by the fact that such a rule may give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest. (428 U.S. at 603).

This language points out very clearly the danger to the public interest in giving a subordinate state agency *carte blanche* to override antitrust laws. These dangers are likewise present when the state agency is a municipality, especially when engaged in a business activity.

CONCLUSION

The interpretation which this Court gave to the Sherman Act in *Parker* has its foundation in the federal nature of our Republic as a Union of States, an implicit factor to be taken into account in ascertaining the intention of Congress. Cities' position would not only preserve the freedom of 50 states to legislate without regard to the federal antitrust laws, but would give the same liberty to every municipality—there are over 18,000 in the United States—limited only by the scope of its delegated powers. The effect would be to treat the Union as a federation of municipalities, not of states, which is scarcely likely to represent the intention of Congress.

Parker, Goldfarb and *Cantor* have gone no further than to recognize an exemption from federal antitrust laws where the action implements directions of the state acting as sovereign. Cities' test is purely mechanical: the antitrust inquiry ends upon a finding that the action was by a municipality.

These *amici curiae* urge this Court not to so enlarge opportunities to engage in anticompetitive conduct forbidden by the federal antitrust laws.

Respectfully submitted,

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